Priyamas Export Corp Sdn Bhd v Bank Buruh (M) Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–858 OF 1995
NH CHAN, ABU MANSOR AND HAIDAR JJCA
4 JUNE 1998

Evidence *— Adverse inference — Failure to call witness — Failure to name all parties in settlement agreement — Witness not called at trial — Whether judge was right in invoking s 114(g) of the Evidence Act 1950*

Land Law *— Charge — Discharge of — Parties executed settlement agreement by consent to deal with release of properties under charge — No order for sale by court — Whether this contravened the National Land Code 1965*

The appellant ('the plaintiff') filed an action in the High Court against the respondent ('the defendant'), praying for, inter alia, a declaration that the purported consent order and the purported settlement agreement executed by the plaintiff and the defendant is null and void and be set aside. The judge dismissed the plaintiff's action and the plaintiff appealed.

At the hearing of the trial, counsel for the defendant raised two preliminary objections, one of which was that since the consent order and the settlement agreement ought not to have been granted by the court and since they involved parties other than the plaintiff and the defendant, any declaration the court may eventually make would affect the rights of other parties involved. The other parties should therefore be made parties in this action. The plaintiff's counsel's reply was that the other remaining party was the receiver and manager of Selvam Holdings (M) Sdn Bhd whose name does not appear in the settlement agreement and that there was no such entity as the receiver and manager or liquidator of Selvam Holdings (M) Sdn Bhd. He further submitted that the winding-up court had earlier held that Selvam Holdings (M) Sdn Bhd was not wound up. The judge dismissed the defendant's preliminary objections. The legal issues that arose in the appeal were: (i) whether the settlement agreement was in contravention of the National Land Code 1965; and (ii) the validity of the winding-up order against Selvam Holdings (M) Sdn Bhd.

Held, dismissing the appeal:

(1) In trying to set aside the consent order, the plaintiff failed to name all the parties in the settlement agreement in the proceedings before the judge. At the end of the trial, none of the parties were called as witnesses and the judge was right in invoking s 114(g) of the Evidence Act 1950 against the plaintiff. The onus is on the plaintiff to call the relevant witnesses as promised for not citing all the parties in the settlement agreement to the present

proceedings. The plaintiff could not act on behalf of the other parties who chose not to intervene in the application of the plaintiff to set aside the consent order and the settlement agreement (see p 285D and G).

(2) The judge was aware of the issues on the validity of the settlement agreement and consequently the jurisdiction to make a consent order. However, the judge was right to take the view that all the issues raised in the earlier proceedings had been amicably and conclusively resolved between the parties as per the settlement agreement that resulted in the discontinuance of all the actions. The consent did not in any way appear to have been given under a misapprehension or from a misstatement or want of materials. The plaintiff freely gave its consent to the terms embodied in the settlement agreement in so far as they affect the interests of the plaintiff. Therefore, the question of the invalidity of the settlement agreement does not arise. The judge was right in not making a ruling on the settlement agreement and the jurisdiction issues (see p 286B and G).

(3) There had been no order for sale given by the court other than the statutory notice issued by the chargee bank on any of the charged property prior to the consent order. It is therefore well within the rights of the parties, namely the chargors and the chargees and their authorized representatives in those circumstances, to enter into the settlement agreement by consent to deal with the release of those properties under the charge on agreed terms. This did not contravene the National Land Code 1965 (see p 287E).

(4) Since Abdul Aziz J had earlier decided that Selvam Holdings (M) Sdn Bhd had been properly wound up, it is not for the plaintiff to relitigate on the issue of the validity of the winding-up order and the appointment of the liquidators and their subsequent actions in the present proceedings. The proper course would be to appeal against the order of Abdul Aziz J (see p 287F and I).

[Bahasa Malaysia summary

Perayu ('plaintif') telah memfailkan satu tindakan dalam Mahkamah Tinggi terhadap responden ('defendan'), memohon untuk mendapatkan, antara lainnya, satu pengisytiharan bahawa perintah persetujuan dan perjanjian penyelesaian yang dikatakan telah disempurnakan oleh plaintif dan defendan adalah batal dan tak sah dan hendaklah diketepikan. Hakim telah menolak tindakan plaintif dan plaintif telah merayu.

Di perbicaraan tersebut, peguam bagi pihak defendan telah membangkitkan dua bantahan awal, salah satu daripadanya adalah bahawa oleh kerana perintah persetujuan dan perjanjian penyelesaian tersebut seharusnya tidak diberikan oleh mahkamah dan oleh kerana ianya melibatkan pihak-pihak selain daripada plaintif dan defendan,

apa-apa pengisytiharan yang akan dibuat oleh mahkamah akhirnya akan menjejaskan hak pihak-pihak lain yang terlibat. Pihak-pihak yang lain itu seharusnya dengan itu dijadikan pihak-pihak dalam tindakan ini. Jawapan peguam plaintif adalah bahawa pihak yang selebihnya itu merupakan penerima dan pengurus Selvam Holdings (M) Sdn Bhd yang mana namanya tidak terdapat dalam perjanjian penyelesaian tersebut dan bahawa tidak terdapatnya sebarang entiti yang sedemikian sebagai penerima dan pengurus atau penyelesai Selvam Holdings (M) Sdn Bhd. Beliau selanjutnya berhujah bahawa mahkamah penggulungan telah pada awalnya memutuskan bahawa Selvam Holdings (M) Sdn Bhd telah digulung. Hakim telah menolak bantahan awal defendan. Isu undang-undang yang berbangkit dalam rayuan tersebut adalah: (i) sama ada perjanjian penyelesaian itu melanggari Kanun Tanah Negara 1965; dan (ii) keesahan perintah penggulungan terhadap Selvam Holdings (M) Sdn Bhd.

Diputuskan, menolak rayuan tersebut:

(1) Dalam percubaan untuk mengenepikan perintah persetujuan tersebut, plaintif telah gagal untuk menamakan kesemua pihak-pihak dalam perjanjian penyelesaian tersebut dalam prosiding di hadapan mahkamah. Di penghujung perbicaraan, tidak satu pun daripada pihak-pihak tersebut dipanggil sebagai saksi dan hakim adalah betul dalam menggunakan s 114(g) Akta Keterangan 1950 terhadap plaintif. Bebanan adalah di atas plaintif untuk memanggil saksi-saksi yang relevan sepertimana yang dijanjikan kerana tidak menyebut kesemua pihak-pihak dalam perjanjian penyelesaian tersebut kepada prosiding semasa. Plaintif tidak boleh bertindak bagi kesemua pihak-pihak yang lain itu yang telah memilih untuk tidak mencelah dalam permohonan plaintif untuk mengenepikan perintah persetujuan dan perjanjian penyelesaian tersebut (lihat ms 285D dan G).

(2) Hakim sedar mengenai isu-isu berhubung dengan keesahan perjanjian penyelesaian tersebut dan bidangkuasa untuk membuat perintah persetujuan tersebut. Walaubagaimanapun, hakim betul dalam berpendapat bahawa kesemua isu-isu yang telah dibangkitkan dalam prosiding yang awal telah diselesaikan secara berbaik-baik dan secara muktamad antara pihak-pihak tersebut berhubung dengan perjanjian penyelesaian tersebut yang mana mengakibatkan pemberhentian kesemua tindakan-tindakan tersebut. Persetujuan tersebut nampaknya tidak diberikan dalam keadaan salah faham atau hasil daripada satu salah-pernyataan atau kerana ketiadaan bahan. Plaintif dengan bebas telah memberikan persetujuannya kepada terma-terma yang telah disemadikan dalam perjanjian penyelesaian tersebut sejauhmana ianya menjejaskan kepentingan plaintif. Dengan itu, persoalan ketidak-esahan perjanjian penyelesaian tersebut tidak berbangkit. Hakim bertindak betul dalam tidak membuat satu keputusan di

atas perjanjian penyelesaian tersebut dan isu-isu bidangkuasa (lihat ms 286B dan G).

(3) Tidak terdapat sebarang perintah untuk jualan yang telah diberikan oleh mahkamah yang selain daripada notis berkanun yang telah dikeluarkan oleh bank pemegang gadaian ke atas mana-mana daripada hartanah yang telah digadaikan sebelum perintah persetujuan. Ianya dengan itu sesungguhnya menjadi hak pihak-pihak tersebut, iaitu penggadai dan pemegang gadaian dan wakil-wakilnya yang dibenarkan dalam keadaan itu, untuk memasuki perjanjian penyelesaian dengan persetujuan untuk berurusan dengan pelepasan hartanah-hartanah tersebut di bawah gadaian itu atas terma-terma yang dipersetujui. Ini tidak melanggari Kanun Tanah Negara 1965 (lihat ms 287E).

(4) Oleh kerana Abdul Aziz H telah pada awalnya memutuskan bahawa Selvam Holdings (M) Sdn Bhd telah digulung dengan betul, ianya bukan hak plaintif untuk melitigasikan semula mengenai isu keesahan perintah penggulungan tersebut dan perlantikan penyelesai-penyelesai tersebut dan tindakan-tindakan mereka yang kemudiannya dalam prosiding semasa ini. Jalan yang menurut aturan adalah untuk merayu terhadap perintah Abdul Aziz H (lihat ms 287F dan I).]

Notes

For cases on adverse inference in failure to call witness, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 92–97.

For cases on discharge of charges, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1419–1421.

Cases referred to

Chee Kuan Cheng v Chua Kong Kah [1967] 2 MLJ 74 (refd)

Ganapathy Chettiar v Lum Kum Chun & Ors [1981] 2 MLJ 45 (refd)

Khan v Golechha International Ltd [1980] 1 WLR 1482 (refd)

MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener) [1992] 2 MLJ 642 (refd)

Selvam Holdings (Malaysia) Sdn Bhd v Toby Lam (as the receiver and manager as well as the liquidator of Selvam Holdings (M) Sdn Bhd) & Anor [1995] 1 AMR 139 (refd)

Toh Seow Ngan & Ors v Toh Seak Keng & Ors [1990] 2 MLJ 303 (refd)

Legislation referred to

Evidence Act 1950 s 114(g)

National Land Code 1965

Rules of the High Court 1980 O 33

Appeal from: Summons No D5–22–1185 of 1992 (High Court, Kuala Lumpur)

K Jaya Simbun (*CV Khrishnadevan* with him) (*Jaya Simbun Khrishna & Co*) for the appellant.

KS Narayanan (*Saranjit Singh* with him) (*KS Narayanan & Associates*) for the respondent.

Haidar JCA (delivering judgment of the court): Priyamas Export Corp Sdn Bhd, the plaintiff (appellant), filed an action in the High Court (Commercial Division), Kuala Lumpur vide suit No D5–22–1185–1992 against Bank Buruh (M) Bhd, the defendant (respondent), praying for:

(i) a declaration that the purported consent order dated 1 March 1991 and the purported settlement agreement dated 27 February 1991 executed by the plaintiff and the defendant is null and void and be set aside;

(ii) the sum of RM600,000;

(iii) damages;

(iv) an order that the defendant do forthwith return the titles held under EMR 3955, Lot 1040, Mukim of Petaling and EMR 5687, Lot 1438, Mukim of Batu together with the blank transfer forms executed by the plaintiff *and a registrable discharge of the defendant's charges over these properties*;

(v) interest on (ii) and (iii) above at the rate of 8% pa, from 15 March 1991 to the date of judgment;

(vi) interest on (v) above at the rate of 8% pa from the date of judgment to the date of realization;

(vii) costs; and

(viii) such further and other relief as this honourable court may deem fit to grant.

The learned judge dismissed the plaintiff's action with costs. Hence the appeal.

We dismissed the appeal with costs. We now set out our reasons.

It would appear from the judgment of the learned judge that the plaintiff was rather uncertain of the directions that it should take in the proceedings.

By way of a summons in chambers dated 16 August 1994, the plaintiff had asked for leave to withdraw the action and for such other order the court deemed fit. However, at the hearing of its application on 21 November 1994, counsel for the plaintiff asked the court to determine the issue of the consent order and the settlement agreement before it proceeded with the withdrawal. This was strongly objected to by counsel for the defendant as the matter was ready for trial and in any event the points raised were not part of the pleadings unless amendments are made first. It was agreed by counsel that amendments should be made first and thereafter to file an

application to determine the issue/issues raised. The application was then withdrawn by consent with costs in the cause.

Subsequently, the plaintiff filed a summons in chambers upon a certificate of urgency on 9 May 1995 to obtain leave of the court to refer questions of law pursuant to O 33 of the Rules of the High Court 1980 (see p 11 of the appeal record Vol 1).

When the application came for hearing on 6 July 1995, counsel for the plaintiff applied to withdraw the application with no order as to costs and by consent of counsel for the defendant, the court accordingly struck out the application.

At the hearing of the trial proper, counsel for the defendant raised two preliminary objections, viz:

(a) since the consent order and the settlement agreement ought not to have been granted by the court and since they involved parties other than the plaintiff and the defendant, any declaration the court may eventually make would affect the rights of other parties involved. It was imperative that the other parties be made parties in this action;

(b) the plaintiff had taken a conflicting stand as regards case D4–22–1329–91 which was after the consent order and settlement agreement were entered into.

The plaintiff's counsel's reply was:

(a) There were only two other parties, one being the sister (Cecilia Sarah) of the plaintiff's director and main witness. She has not indicated her desire to participate in the proceedings and if need be, she could be called as a witness.

The other remaining party was Toby Lam ('Toby'), the receiver and manager of Selvam Holdings (M) Sdn Bhd whose name does not appear in the settlement agreement and he maintained that there was no such entity as the receiver and manager or liquidator of Selvam Holdings (M) Sdn Bhd. He went on further to submit that it was a question of law and that a receiver and manager need not be made a party as he had no locus standi since his appointment was in issue.

Further, the winding-up court had earlier held that Selvam Holdings (M) Sdn Bhd was not wound up. He reiterated that the winding up was a nullity because of non-service and consequently there could not be any liquidator.

(b) In respect of case D4–22–1329–91, he explained that steps had been taken to withdraw it but no consent had been obtained and there was only the question of costs left. In any event, he said that the proceedings were void as it was in the name of Selvam Holdings (M) Sdn Bhd which was a non-entity.

The learned judge dismissed the preliminary objections as he held that the disputed facts should properly be evaluated at a trial.

A At the trial, the plaintiff called one witness, Jean Louis Jayaraj, its managing director (PW1). The defendant called Moorthy s/o Applanaidu, its manager (DW1).

As the consent order and the settlement agreement recorded vide Originating Summons F31–4147–86 are now sought by the plaintiff to be B set aside, it would then be appropriate to set out in full the consent order and the settlement agreement:

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(CIVIL DIVISION)
ORIGINATING SUMMONS F31–4147–86

C

Between

Selvam Holdings (M) Sdn Bhd (under Liquidation)	...	Plaintiff

And

D

Priyamas Export Corp Sdn Bhd	...	Defendant

And

Bank Buruh (M) Bhd	...	Third Party

E BEFORE THE HONOURABLE MR JUSTICE DATO' NH CHAN
THIS 1ST DAY OF MARCH 1991 IN CHAMBERS

ORDER

UPON HEARING Mr PS Gill for the plaintiff and Mr Prasad Abraham for the defendant and Mr KS Narayanan for the third party.

F AND BY CONSENT IT IS ORDERED THAT the terms of settlement having been agreed between the parties and the persons and company whose names are set out in the settlement agreement dated 27 February 1991 and such terms having been presented to the court initialled in the form annexed hereto by counsels of the parties and representing also the other persons and companies referred to in the said terms, an order be made G in the terms and that a copy of such settlement agreement and that this order be placed with the files of the proceedings hereinafter set out:

(1) Originating Summons No F33/80 between Bank Buruh and JK Selvam & Roseline Selvam.

(2) Federal Court Civil Appeal No 89/83 between JL Selvam & Roseline Selvam and Bank Buruh (M) Bhd.

H

(3) Civil Suit No F94/82 between JL Selvam and Bank Buruh (M) Bhd.

(4) Originating Summons No F30/84 between JL Selvam and Bank Buruh (M) Bhd.

(5) Originating Summons No F408/84 between JL Selvam and Bank Buruh (M) Bhd.

I

(6) Originating Motion No F17/84 between JL Selvam and Bank Buruh (M) Bhd, Francis Chong, Kamal Al Yaffi & Toby Lam & Arab Malaysian Development Bank.

(7) Civil Suit No F7/84 between JL Selvam and Toby Lam & Bank Buruh (M) Bhd.

(8) Originating Summons No F693/82 between Lymas Development Finance Corp Sdn Bhd and Bank Buruh (M) Bhd.

(9) Originating Summons No F1444/83 between Lymas Development Finance Corp Sdn Bhd and Bank Buruh (M) Bhd.

(10) Civil Suit No 536/79 between Bank Buruh (M) Bhd and Selvam Holdings (M) Sdn Bhd, Roseline Selvam, JL Selvam, Seenivasage Reddiar and Samuel Abishegam.

(11) Civil Suit No 34/79 — Notice of Motion — contributories of Selvam Holdings.

AND IT IS FURTHER ORDERED:

The two caveats on the property held under:

(1) Caveat Presentation No 5184/86 Jilid 67 Folio 126 lodged by Priyamas Export Corp Sdn Bhd of 1429, Jalan E3/13, Taman Ehsan, 52100 Kepong, Kuala Lumpur on the 19 August 1986; and

(2) Caveat Presentation No 1310/87 Jilid 77 Folio 114 lodged by Cecilia Sarah a/p J Selvam IC No 3110309 c/o Murthi & Partners on 16 March 1987

do stand discharged and cancelled.

AND IT IS FURTHER ORDERED that each of the proceedings listed above in this order numbered (1) to (11) shall be deemed to be dismissed or discontinued in terms of para 5 of the settlement agreement.

Dated 1 MARCH 1991

tt Siti Salwa bt Musa
Senior Assistant Registrar
High Court, Kuala Lumpur.

Annexure

Settlement Agreement

This settlement agreement is made between:

(1) Bank Buruh (M) Bhd of 14, Bangunan Kuwasa, 5, Jalan Raja Laut, 50350 Kuala Lumpur;

(2) the receivers and managers and liquidators of Selvam Holdings (M) Sdn Bhd;

(3) Priyamas Export Corp Sdn Bhd (formerly known as Lymas Finance Corp Sdn Bhd) of 1429, Jalan E3/13 Taman Ehsan, 52100 Kuala Lumpur;

(4) Cecilia Sarah a/p J Selvam in her personal capacity and for and on behalf of all the members of her family including JLJ Selvam and the beneficiaries of the estate of the late Rosaline Selvam;

(5) Cecilia Sarah a/p J Selvam for and on behalf of the contributories of Selvam Holdings (M) Sdn Bhd in Kuala Lumpur Notice of Motion No 34 of 1979; and

(6) M/s Priyamas Export Corp Sdn Bhd and Cecilia Sarah a/p J Selvam as caveators of the land held under Lot No 445, CT 15374 mukim of Ulu Semenyih, district of Ulu Langat which is a subject matter of Kuala Lumpur High Court Civil Suit No 31–4147–86.

IT IS AGREED BETWEEN THE PARTIES:

That subject to the approval and consent of court and in a move to amicably and conclusively resolve the disputes between the various parties hereinbefore referred to, it is hereby agreed as follows:

1 The bank and each of the parties herein before referred to in the settlement agreement confirm that as on 31 December 1990, the total sums outstanding and due to the bank by M/s Selvam Holdings Sdn Bhd under the following loan accounts with the bank namely, 241–1158, 55–5319, 55–5008 and bills amounts to RM13,400,000 which is inclusive of interest to that date (hereinafter referred to as the 'agreed outstanding sums').

2 It is agreed and confirmed by the parties hereto that the land security now available to the bank for repayment of the said outstanding sums under the said accounts are as follows:

(1) UK Heights property

Title No G15817 Lot 4479 and Title No C15818 Lot No 4480, all in the Mukim of Ampang, District of Gombak, Selangor. (Land area — 15,347 sq ft.) Registered owner — M/s Selvam Holdings (M) Sdn Bhd.

(2) Ipoh Road property

Lot No 1438, EMR 5687, Mukim of Batu, District of Federal Territory. (Land area — 19,929 sq ft.) Secured by a third party charge. Registered owner — M/s Priyamas Export Corp Sdn Bhd.

(3) Taman Yarl property

Lot No 1040, EMR 3955, Mukim of Petaling, District of Federal Territory. (Land area 2.125 acres.) Secured by a third party charge. Registered owner — M/s Priyamas Export Corp Sdn Bhd.

(4) Puchong property

QT (M) 9 Lot No 873, Mukim of Damansara, District of Petaling (Area — 3.594 acres.) Secured by a third party charge. Registered owner — M/s Priyamas Export Corp Sdn Bhd.

3 As settlement of the agreed outstanding sums, it is agreed between the parties that the four properties referred to hereinbefore shall be dealt with in the manner hereinafter stated in extinguishment of the said agreed outstanding sums:

(1) (a) The said Ipoh Road property (refer para 2(2) above) and the said Taman Yarl property (refer para 2(3) above) property shall be transferred forthwith to the bank and or its appointed nominees; and

(b) The Ukay Heights property (refer para 2(1) above) shall be transferred to the bank or its appointed nominee and the receiver/liquidator of Selvam Holdings Sdn Bhd shall execute all such documents as is necessary to validly effect the transfer;

and the registered owners of the said Ukay Heights property, Ipoh Road property and Taman Yarl property do forthwith provide and deposit with the bank duly executed memorandum of transfer, transferring the said properties to the bank and its appointed nominees and the senior assistant registrar of the High Court shall,

if necessary, execute all such documents as is necessary to validly effect such transfer;

AND

(2) (a) that Priyamas Export Corp Sdn Bhd or its appointed nominees shall have the right to redeem the Puchong property (refer para 2(4) above) from the bank at an agreed redemption sum of RM600,000 provided such redemption sum of RM600,000 is fully paid to the bank by either Priyamas Export Corp Sdn Bhd or its appointed nominees on or before 12 noon on 25 April 1991 and the bank shall deliver in exchange for the said payment, to the said Priyamas Export Corp Sdn Bhd or its appointed nominees as the case may be, the document of title to the said Puchong property together with a document discharging the charge of the bank on the said Puchong property.

(b) in the event Priyamas Export Corp Sdn Bhd or its appointed nominees fail to pay the redemption sum of RM600,000 in full by 12 noon on 25 April 1991, then in that event, it is agreed that the bank shall be at liberty to transfer the said Puchong property forthwith thereafter to the name of the bank and/or its appointed nominees and the senior assistant registrar shall execute all such documents as may be necessary to effect such transfer.

4 Upon due transfer and registration of the properties referred to in para 3(1) and 3(2)(a) or (b) as the case may be, then in that event it shall be deemed that the agreed outstanding sums have been fully and duly extinguished and settled and there shall be no further claims whatsoever by the bank or the parties herein against each other.

5 This settlement agreement shall result in discontinuance of all actions detailed in the consent order as if the said actions have been dismissed or discontinued and it is agreed that a copy of the consent order and this settlement agreement shall be placed in the files of each of such actions.

6 It is further specifically agreed:

(1) that upon execution of this settlement agreement and obtaining of the consent order, the caveats lodged on Lot No CT 15374 Mukim of Ulu Semenyih, District of Ulu Langat (Kajang property) namely:

(a) Caveat Presentation No 5184/86 Jilid 67 Folio 126 lodged by Priyamas Export Corp Sdn Bhd of 1429, Jalan E3/13, Taman Ehsan, 52100 Kepong, Kuala Lumpur on 19 August 1986; and

(b) Caveat Presentation No 1310/87 Jilid 77 Folio 114 lodged by Cecilia Sarah a/p J Selvam IC No 3110309 c/o Murthi & Partners on 16 March 1987 as noted in Civil Suit No 31–4147–86 shall be deemed discharged and removed and simultaneously upon execution of the settlement agreement the said caveators Priyamas Export Corp Sdn Bhd and Cecilia Sarah a/p J Selvam shall deposit with the bank duly executed documents signifying their consent to the withdrawal of the caveats and the senior assistant registrar of the High Court, if necessary, shall execute

all such documents as may be necessary to effect the removal of the said caveats.

(2) that the discharge and removal of the two caveats referred to in para 6(1) above, shall facilitate and ensure the transfer forthwith thereafter of the Kajang property to the trustees of Yu Hwa Chinese Primary School, Kajang and the fixed deposit of RM795,093.75 plus interest thereon held by the bank shall be released absolutely and unconditionally to the bank.

7 Further it is agreed, all parties shall withdraw any allegations whatsoever of irregularities or impropriety made in any of the said actions in the consent order, by any party against the other.

8 That Priyamas Export Corp Sdn Bhd shall provide and deliver up a resolution of the company at an extraordinary general meeting authorizing and approving the terms herein pursuant to s 132 of the Companies Act 1965.

9 Save for the matters referred to in this settlement agreement and consent order, the parties confirm and undertake that there are no other claims, actions and proceedings whatsoever by or against any of the other parties hereto.

10 Lastly, there shall be no order as to costs.

Dated this 27 February 1991

Signed by:

G Nadarajah and Kim Chai Seong on Behalf of Bank Buruh (M) Bhd) (signatures)

in the presence of:
Sgd

KS Narayanan
Advocates & Solicitors
Kuala Lumpur

Advocates & Solicitors

Receivers and Managers of Selvam Holdings (M) Sdn Bhd) (signatures)

in the presence of:

Sgd
Paramjit Singh Gill
Advocate & Solicitor
Kuala Lumpur

Advocates & Solicitors

Priyamas Export Corp Sdn Bhd) (signatures)

in the presence of:

Sgd
Prasad Abraham
Advocates & Solicitors
Kuala Lumpur

Advocates & Solicitors

Cecilia Sarah a/p J Selvam)
For and on behalf of the)
Members of her family) (signature)
including JLJ Selva)

in the presence of:

Sgd
Prasad Abraham
Advocates & Solicitors
Kuala Lumpur

Advocates & Solicitors

Cecilia Sarah a/p J Selvam)
For and on behalf of the)
Contributories of Selvam) (signatures)
Holdings (M) Sdn Bhd)

in the presence of:

Sgd
Prasad Abraham)
Advocates & Solicitors)
Kuala Lumpur

Advocates & Solicitors) (signatures)

Priyamas Export Corp)
Sdn Bhd and Cecilia Sarah
a/p J Selvam as caveators) (signatures))

in the presence of:

Sgd
Prasad Abraham)
Advocates & Solicitors)
Kuala Lumpur

Advocates & Solicitors) (signatures)

The settlement agreement in Originating Summons F31–4147–86 is in the nature of a global settlement covering 11 cases in all of which the plaintiff is involved only in cases Nos 8 and 9, that is, cases Nos F 693/82 and F 1444/83 respectively. Though in cases Nos 8 and 9, Lymas Development Finance Corp Sdn Bhd was referred to as the party therein, PW1 gave evidence that there was a change of name to the present plaintiff on 31 March 1986 (see also Form 13 at p 285 of the appeal record (Bahagian C)). This is not disputed. The consent order dated 1 March 1991 and the settlement agreement dated 17 February 1991 which the plaintiff purportedly tried to set aside, the parties are Selvam Holdings (M) Sdn Bhd (under liquidation) (as plaintiff), Priyamas Export Corp Sdn Bhd (as defendant) and Bank Buruh (M) Bhd (as third party). In so far as the Originating Summons F31–4147–86 is concerned, it is in respect of the discharge of charge of the property held under:

(1) Caveat Presentation No 5184/64 Jilid 67 Folio 126 lodged by Priyamas Export Corp Sdn Bhd of 1429, Jalan E 3/13, Taman Ehsan, 52100 Kepong, Kuala Lumpur on 19 August 1986; and

(2) Caveat Presentation No 1310/87 Jilid 77 Folio 114 lodged by Cecilia Sarah a/p J Selvam IC No 3110309 c/o Murthi & Partners on 16 March 1987.

It was also a term of the consent order that each of the proceedings listed therein numbered (1) to (11) shall be deemed to be dismissed or discontinued in terms of para 5 of the settlement agreement as annexed. Paragraph 5 reads:

> This settlement agreement shall result in discontinuance of all actions detailed in the consent order as if the said actions have been dismissed or discontinued and it is agreed that a copy of the consent order and this settlement agreement shall be placed in the files of each of such actions.

At the outset, we must point out that in trying to set aside the consent order the plaintiff failed to name all the parties in the settlement agreement in the proceedings before the learned judge. Counsel for the defendant at the early stage of the proceedings raised a preliminary objection on this issue. However, as counsel for the plaintiff replied that the plaintiff would be calling the relevant parties as witnesses, the learned judge had overruled the preliminary objection. At the end of the trial, none of the parties were called as witnesses and the learned judge (we think rightly so) then stated in his judgment that he tended to agree with the earlier preliminary objection of counsel for the defendant and hence invoked s 114(g) of the Evidence Act 1950 against the plaintiff. The plaintiff's counsel's reply was that the agreed documents speak for themselves. Hence, no need to call witnesses. With respect, we disagreed. The learned judge in his judgment at p 14 of the appeal record Vol 1 in overruling earlier on the preliminary objections said:

> ... the disputed facts should properly be evaluated at a trial.

We are of the view that the onus is on the plaintiff to call the relevant witnesses as promised for not citing all the parties in the settlement agreement to the present proceedings. The plaintiff could not act on behalf of the other parties who chose, so to speak, not to intervene in the application of the plaintiff to set aside the consent order and the settlement agreement. However, if the plaintiff is not a party to the settlement agreement and the consent order, only then, as contended by counsel for the plaintiff, that the rule of natural justice would have been breached and the High Court would have no jurisdiction to make the consent order affecting the rights of the plaintiff (*Toh Seow Ngan & Ors v Toh Seak Keng & Ors* [1990] 2 MLJ 303). On the facts, the plaintiff is estopped from challenging the validity of the settlement agreement and the consent order.

Be that as it may, counsel for the plaintiff submitted that the learned judge should consider the issues as to the validity of the settlement agreement before the issue as to the jurisdiction of the court is to be determined as the plaintiff contended that the settlement agreement is void. Counsel for the

plaintiff further contended that only then would the issue of whether estoppel arises can be determined.

In his judgment, we observed that the learned judge was aware of the issues on the validity of the settlement agreement and consequently the jurisdiction to make a consent order. However, the learned judge was of the view that all the issues, among them the validity of the RM1.7m, the bank guarantee, charges and debentures, the appointment of receivers and managers and liquidators, that the '(M)' in the company's name does not stand for (Malaysia) had been raised in the earlier proceedings which had been amicably and conclusively resolved between the parties as per the settlement agreement that resulted in the discontinuance of all the actions. Was the learned judge right in doing so?

We are of the opinion that the learned judge was right.

In *Ganapathy Chettiar v Lum Kum Chun & Ors* [1981] 2 MLJ 45, the Federal Court held that an order by consent is evidence of a contract between the parties and is binding on all parties to the order, all the more so where there is not the slightest question of any mistake as to facts or law.

In *Khan v Golechha International Ltd* [1980] 1 WLR 1482, it was held that principal issues already adjudicated upon could not be relitigated between the parties and this extends to *concessions* and *admissions* made in the Court of Appeal which led to dismissal of an appeal by consent for they were just as efficacious for the purposes of issue estoppel as a judgment delivered after full argument.

We are of the view that the consent did not in any way appear to have been given under a misapprehension or from a misstatement or want of materials (see *Chee Kuan Cheng v Chua Kong Kah* [1967] 2 MLJ 74 at p 76).

The plaintiff freely gave its consent to the terms embodied in the settlement agreement in so far as they affect the interests of the plaintiff. Therefore, the question of the invalidity of the settlement agreement that was annexed to the consent order does not arise. Hence, the learned judge was right in not making a ruling on the settlement agreement and the jurisdiction issues as counsel for the plaintiff had submitted that he should have done before considering the estoppel issue.

In any event, as the appeal is by way of rehearing, we will address the legal issues relied on by the plaintiff, viz:

(1) contravention of the National Land Code 1965;

(2) validity of the winding-up order against Selvam Holdings (M) Sdn Bhd.

Contravention of the National Land Code 1965

The plaintiff claims that in so far as the plaintiff's part in the settlement agreement is concerned, the same is void for being in contravention of the National Land Code 1965 based on the following grounds:

(a) the relationship between the plaintiff and the defendant prior to the settlement agreement being entered into was that of chargor and chargee;

(b) the plaintiff was under a liability to the defendant for debts owed by a third party. These debts were secured by third party charge over three pieces of lands belonging to the plaintiff.

It was submitted that the settlement agreement was an attempt to circumvent the provisions of the National Land Code 1965 which governs the rights and remedies of a chargor and a chargee. Therefore, it was submitted that such an agreement would be void for being against public policy.

The short answer to that is to be found in the judgment of the Supreme Court in *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642 where at p 642 it was held:

> ... under the Code, there is nothing to prevent a chargor with the consent of the chargee to sell the charged property by private treaty ... .

It is to be noted that on the facts of this case, there had been no order for sale given by the court (other than the statutory notice issued by the chargee bank (defendant)) on any of the charged property prior to the consent order. It is therefore well within the rights of the parties, namely the chargors and the chargees and their authorized representatives in those circumstances, to enter into the settlement agreement by consent to deal with the release of those properties under the charge on agreed terms as was done in the settlement agreement and the consent order.

Validity of the winding-up order against Selvam Holdings (M) Sdn Bhd

Abdul Aziz J, in *Selvam Holdings (Malaysia) Sdn Bhd v Toby Lam (as the receiver and manager as well as the liquidator of Selvam Holdings (M) Sdn Bhd) & Anor* [1995] 1 AMR 139 conclusively decided that Selvam Holdings has been properly wound up and in those circumstances, the appointment of the liquidators and their subsequent actions are clearly valid and proper. This is what Abdul Aziz J said at p 146:

> I find as a fact that the company that was ordered to be wound up on 19 November 1979 in Companies Winding-up No 34/1979 was the applicant and I rule that the winding-up order was not rendered null and void and ineffective by reason that it referred to the applicant as Selvam Holdings (M) Sdn Bhd.

We are of the view that the learned judge in this case correctly accepted the judgment of Abdul Aziz J. It is not for the plaintiff to relitigate on the issue of the validity of the winding-up order and the appointment of the liquidators and their subsequent actions in the present proceedings. The proper course would be to appeal against the order of Abdul Aziz J.

For the record, when PW1 was cross-examined regarding the word 'Malaysia' and the letter 'M', his answer at p 276 of the appeal record Vol 1, was:

> I am not making any fuss over it.

However, it would appear that the plaintiff is in fact trying to make a fuss now by claiming that it has the right to make a collateral attack on the judgment in the present proceedings.

To recapitulate, the plaintiff as one of the parties to the settlement agreement agreed that all 12 existing actions between the parties be set aside and discontinued and that there would be no further claims by any party. This is amply covered and agreed to in paras 7 and 9 of the settlement agreement which read:

> 7 Further it is agreed, all parties shall withdraw any allegations whatsoever of irregularities or impropriety made in any of the said actions in the consent order, by any party against the other.
>
> 9 Save for the matters referred to in this settlement agreement and consent order, the parties confirm and undertake that there are no other claims, actions and proceedings whatsoever by or against any of the other parties hereto.

In this respect, the learned author of *Doctrine of Res Judicata* (2nd Ed) (1969) at p 38 para 42 stated:

> Any issue on question which is thus shown to have been recognized or taken by the parties as the subject of the litigation, and which appeared fundamental to the judgment or order agreed to, is deemed to have been thereby conclusively determined, so as to preclude any subsequent challenge.

We are therefore satisfied that there are no merits in the submissions of counsel for the plaintiff.

For the reasons stated, the consent order and the settlement agreement are valid and enforceable and the plaintiff's action to set aside the consent order and the settlement agreement was rightly dismissed with costs by the learned judge.

We accordingly dismissed the appeal with costs. The deposit was ordered to be paid to the defendant on account of taxed costs.

Appeal dismissed.

Reported by David Lai